No. 16515

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. BUMB, Trustee in Bankruptcy of the Estate of AMPSCO PRODUCTS OF CALIFORNIA, INC., Bankrupt,

Appellant,

vs.

L. E. McINTYRE and M. H. McINTYRE, doing business as L. E. McINTYRE & Co.,

Appellees.

APPELLANT'S OPENING BRIEF.

ROBERT H. SHUTAN,
MILTON FEINERMAN,
433 South Beverly Drive,
Beverly Hills, California,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 16515

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. BUMB, Trustee in Bankruptcy of the Estate of AMPSCO PRODUCTS OF CALIFORNIA, INC., Bankrupt,

Appellant,

vs.

L. E. McINTYRE and M. H. McINTYRE, doing business as L. E. McINTYRE & Co.,

Appellees.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

(a) The United States District Court for the Southern District of California had jurisdiction by virtue of 11 U. S. C. §11, Bankruptcy Act, Sec. 2 (Creation of of Courts of Bankruptcy and Their Jurisdiction). The matter came before the District Court upon the filing of a petition in involuntary bankruptcy. An order of adjudication was entered upon the said petition by the District Court. The petition represented that the bankrupt's principal place of business had been within the judicial district of the District Court of the United States, Southern District of California, for a longer period of the six months immediately preceding the filing of the petition than in any other judicial district.

(b) This Court has jurisdiction by virtue of 11 U. S. C. §47, Bankruptcy Act, Sec. 24. The amount in controversy is in excess of $500.00, the appellant

having been ordered to pay to appellee the total sum of $19,221.42, plus interest which will accrue at the rate of 10% per annum on the principal sum of $17,474.02 from and after July 1, 1958 [Tr. 19, 20].

(c) The Referee's findings of fact, conclusions of law and order re chattel mortgage were signed and entered on May 27, 1958 [Tr. 20]. On May 31, 1958, appellant filed its petition for review of Referee's order under the provisions of Bankruptcy Act, Sec. 2, 11 U. S. C. § 11 and Bankruptcy Act, Sec. 39c, 11 U. S. C. § 67c [Tr. 20-22]. On October 7, 1958, the Referee filed his Certificate on Review [Tr. 23]. On October 20, 1958, the Referee filed his Certificate Amending Referee's Certificate on Review [Tr. 27]. After a hearing, the United States District Court for the Southern District of California made its Order Affirming Referee's Decision re Chattel Mortgage, which order was entered on March 13, 1959 [Tr. 28]. On April 10, appellant filed a notice of appeal to the Court of Appeals for the Ninth Circuit [Tr. 30].

Statement of Case.

Appellant in this matter is the trustee in bankruptcy of the estate of Ampsco Products of California, Inc. Said bankrupt corporation, on August 13, 1957, made a general assignment for the benefit of creditors to Ralph Meyer, who accepted the assignment on August 19, 1957. In the course of the assignment, the assignee sold all of the physical assets of the bankrupt corporation for the sum of $28,775.00, free and clear of encumbrances. Prior to said sale and prior to this bankruptcy, L. E. McIntyre & Co. filed an action in the State Court relating to a chattel mortgage which was given to L. E. McIntyre & Co. by the bankrupt. On October 29, 1957,

a petition in involuntary bankruptcy was filed in this matter. An order of adjudication was entered upon the said petition and the assignee paid over all of the funds in his possession to the trustee in bankruptcy. L. E. McIntyre & Co. filed a petition before the Referee in Bankruptcy for an order to show cause requiring the trustee in bankruptcy to show cause why he should not be substituted as party defendant in the aforesaid State Court action in the place and stead of the bankrupt [Tr. 3-7]. After said order to show cause was issued, the trustee in bankruptcy filed his answer opposing the effort to involve the trustee in the State Court suit [Tr. 7]. The trustee in bankruptcy also filed a counterclaim seeking to have the subject chattel mortgage declared invalid [Tr. 7-11]. Thereafter, it was agreed and ordered [Tr. 19] that the question of the validity of the mortgage should be determined by the Bankruptcy Court and not by the aforesaid State Court action. The issue as to the validity of said mortgage was tried before the Referee on March 10, 1958.

The principal ground of objection by the trustee in bankruptcy to the validity of the chattel mortgage was that the purported description of property to be made subject to said mortgage was so inadequate as to fail totally to comply with the statutory requirements of the California Civil Code (Sec. 2956), and that it was impossible to determine with any particularity whatsoever what assets of the bankrupt corporation were subject to the chattel mortgage.

The evidence disclosed and the Referee found that the bankrupt corporation executed and delivered to L. E. McIntyre & Co. a note and chattel mortgage by means of an escrow handled by the Security-First National Bank of Los Angeles. The mortgage purported to cover assets of

the mortgagor described in the body of the subject mortgage only as: "Certain fixtures, machinery and tooling equipment, and located at 224 East Palmer Avenue, in the City of Compton, State of California." A notice of intended mortgage with respect to said mortgage of chattels was executed, recorded and published. The evidence further disclosed and the Referee found that an inventory list describing machinery and equipment of the mortgagor was deposited in said escrow, but that said inventory list was not attached to or made a part of the subject mortgage. An amendment to the escrow instructions prepared by L. E. McIntyre & Co. and the bankrupt corporation affirmatively directed the escrow holder not to attach a list of the inventory to the chattel mortgage being recorded.

The Referee found and concluded that the description as given on the mortgage in itself was self-sufficient [Tr. 59]. The Referee further found and concluded that if there was any insufficiency in description the exact description could be ascertained by following a line of inquiry suggested by information disclosed in the instrument itself [Tr. 17, 62], such "information" in this case being solely the address of the mortgagor.

On the petition for review, the District Court affirmed the Referee's decision and adopted in full the findings of fact, conclusions of law and order of the Referee [Tr. 28-30].

Specification of Errors.

The following are the errors upon which appellant intends to urge that the decision of the lower court be reversed:

1. The District Court erred in failing to reverse the Order of the Referee, dated May 27, 1958, and in affirming said Order.

2. The District Court erred in ratifying, confirming, and approving the Findings of Fact and Conclusions of Law, and Order re Chattel Mortgage, dated May 27, 1958, of the Referee, and in adopting the same in full as the Findings of Fact, Conclusions of Law and Order of the District Court.

3. The District Court erred in respect to said Order, in that the Finding of Fact No. 6 (of the Referee and the District Court) is clearly erroneous in that said Finding 6 actually constitutes a conclusion, which conclusion is not supported by the evidence adduced at the hearing on said matter.

4. The District Court erred in respect to said Order in that the Findings of Fact (of the Referee and of the District Court) fail and omit to include a finding as to which of the items of fixtures, machinery and tooling equipment, which were sold by Ralph Meyer as assignee for the benefit of creditors, were covered by the subject chattel mortgage.

5. The District Court erred in respect to said Order, in that the Conclusion of Law No. 2 (of the Referee and of the District Court) is clearly erroneous, concluding that the subject mortgage was valid and enforceable against creditors, this estate and the trustee in bankruptcy herein.

6. The District Court erred in respect to said Order, in that the Conclusions of Law Nos. 3 and 4 (of the Referee and of the District Court) are clearly erroneous, each being based upon the erroneous conclusion that the subject chattel mortgage is valid and enforceable.

Summary of Argument.

I.

THE REFEREE'S FINDING OF FACT THAT THE DESCRIPTION OF PROPERTY CONTAINED IN THE MORTGAGE WAS SUFFICIENT SHOULD NOT HAVE BEEN SUSTAINED IN THAT THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT IT. THE DESIGNATION AS "FINDINGS OF FACT" OF WHAT IN REALITY ARE CONCLUSIONS OF LAW WILL NOT OPERATE TO LIMIT THE REVIEWING POWER OF THE HIGHER COURT.

II.

TO BE SUFFICIENT AGAINST A THIRD PERSON, AND THUS AGAINST APPELLANT TRUSTEE IN BANKRUPTCY, A DESCRIPTION OF THE MORTGAGED PROPERTY MUST POINT OUT THE SUBJECT MATTER WITH PARTICULARITY SO THAT THIRD PERSONS MAY BE ABLE TO IDENTIFY THE CHATTELS COVERED.

(a) THE "DESCRIPTION" OF THE MORTGAGED PROPERTY, AS IT APPEARS ON THE FACE OF THE SUBJECT MORTGAGE AND UNAIDED BY OUTSIDE INFORMATION, FAILS ADEQUATELY TO DESCRIBE THE PROPERTY INTENDED TO BE MADE SUBJECT THERETO. IT WAS ERROR TO INTERPRET THE WORD "CERTAIN" AS MEANING "ALL".

(b) THE LANGUAGE OF THE CHATTEL MORTGAGE ITSELF TOTALLY FAILS TO SUGGEST A LINE OF INQUIRY, WHICH IF PURSUED WOULD IDENTIFY THE PROPERTY TO BE COVERED BY THE MORTGAGE.

(c) NEITHER THE ESCROW NOR THE INVENTORY LIST WERE REFERRED TO IN THE MORTGAGE, AND IT WAS ERROR TO ADMIT INTO EVIDENCE OVER APPELLANT'S OBJECTION THE LIST OF MACHINERY AND EQUIPMENT WHICH THE PARTIES HAD PLACED INTO ESCROW AND AFFIRMATIVELY WITHHELD FROM THE MORTGAGE AND FROM RECORDATION.

ARGUMENT.

I.

The Referee's Finding of Fact That the Description of Property Contained in the Mortgage Was Sufficient Should Not Have Been Sustained in That There Was No Substantial Evidence to Support It. The Designation as "Findings of Fact" of What in Reality Are Conclusions of Law Will Not Operate to Limit the Reviewing Power of the Higher Court.

Appellant has no quarrel with the well-settled rule that the District Court should accept the Referee's findings of fact unless such findings are clearly erroneous. However, the corollary to that rule is that if there is no substantial evidence to support it, the Referee's findings will not be sustained.

In re Collins (S. D. Calif.), 141 Fed. Supp. 25.

It is equally clear that the designation as "Findings of Fact" of what in reality are conclusions of law will not operated to limit the reviewing power of the higher court.

The issue at the trial and upon this appeal is whether the language in the subject mortgage adequately describes the property to be mortgaged.

In the instant case, the Referee was not presented with any problems of contradictory witnesses or substantially conflicting testimony or evidence. The Referee did not have to weigh the credibility of one witness against the credibility of another. There are no substantial factual conflicts in the evidence presented to the Court.

The issue herein arises upon the inferences and conclusions reached by the Referee from the evidence. Such inferences and conclusions are not conclusive upon the reviewing court; just as in other situations, the trier of fact should resolve disputed issues of fact, but questions of policy and statutory interpretation are ultimately for the Appellate Courts to determine.

The question of whether the description of property in a chattel mortgage is legally adequate, as required by California Civil Code, Section 2956, is a question of statutory interpretation—not a disputed issue of fact, but truly a question of law subject to review by the Appellate Courts.

Furthermore, as the California Supreme Court stated in *Kahriman v. Jones,* 203 Cal. 254, 263 Pac. 537:

> "The provisions of the Civil Code relating to chattel mortgages have been strictly construed by the courts, as indeed, they should be, for those sections give a special right to a lien independent of possession, a situation unknown to the common law with relation to personal property."

For the same effect is the case of *Hopper v. Keys,* 152 Cal. 493, 92 Pac. 1017, in which it was said:

> "It must be conceded that the authority for the creation of chattel mortgages in this state derives its force from the statutory provisions relating to the subject, and that all rights accruing by virtue of such mortgages can be protected and preserved only by fully meeting the requirements of the statute and strictly observing its provisions." (At 92 Pac. 1019, 1020.)

The Referee conceded that his responsibility was one of statutory interpretation [Tr. 59, 60]. His error did not relate to resolving a dispute as to facts, but in interpreting the legislative requirement. More specifically, the Referee erred in allowing a "hard case" to result in bad law—in turning a "doubt" as to what the mortgage meant into a "doubt [that] must be resolved in favor of the one who has the equitable side of the case, which in this case is the mortgagee." [Referee's remarks in ruling from the bench, Tr. 60.] This statement of the Referee is even in direct conflict with the Referee's statement made immediately prior thereto to the effect that the instant case was simply a question of law—"purely upon the technicality of a statute. And, so, it is not a case which calls for the exercise of any equitable jurisdiction that the Court may have; . . . [Tr. 59].

The actual evidence which was presented before the Referee will be reviewed in the arguments to follow.

II.

To Be Sufficient Against a Third Person, and Thus Against Appellant Trustee in Bankruptcy, a Description of the Mortgaged Property Must Point Out the Subject Matter With Particularity so That Third Persons May Be Able to Identify the Chattels Covered.

(a) The "Description" of the Mortgaged Property, as It Appears on the Face of the Subject Mortgage and Unaided by Outside Information, Fails Adequately to Describe the Property Intended to Be Made Subject Thereto. It Was Error to Interpret the Word "Certain" as Meaning "All."

(b) The Language of the Chattel Mortgage Itself Totally Fails to Suggest a Line of Inquiry, Which if Pursued Would Identify the Property to Be Covered by the Mortgage.

(c) Neither the Escrow nor the Inventory List Were Referred to in the Mortgage, and It Was Error to Admit Into Evidence Over Appellant's Objection the List of Machinery and Equipment Which the Parties Had Placed Into Escrow and Affirmatively Withheld From the Mortgage and From Recordation.

The bankrupt had been engaged in the machine shop business in the City of Compton and owned a very substantial amount of machinery, equipment and fixtures. Appellees' claim is based upon a mortgage bearing date of May 25, 1956, a copy of which chattel mortgage is attached as an exhibit to said mortgagee's original petition herein. The subject chattel mortgage was prepared upon a printed form with certain information filled in by

typewriting, plus signatures thereon. The description of the mortgaged property is set forth in the subject mortgage as follows:

> "WITNESSETH: THAT THE MORTGAGOR MORTGAGES TO THE MORTGAGEE ALL THAT CERTAIN PERSONAL PROPERTY SITUATED AND DESCRIBED AS FOLLOWS, TO WIT: *Certain fixtures, machinery and tooling equipment, and located at 224 East Palmer Avenue, in the City of Compton, State of California.*"

The capitalized portion above represents printed portion of the mortgage, and the italicized portion above represents words typed in. The above is the entire description of the property to be subject to said mortgage.

In Section 2956 of the California Civil Code appears the form in which chattel mortgages may be made. It is simple and short:

> "This mortgage, made the..... day of ..... in the year ....., by A B, of ....., mortgagor, to C D, of ...., mortgagee, witnesseth:
>
> That the mortgagor mortgages to the mortgagee (here describe the property), as security for the payment to him of ..... dollars, on (or before) the ..... day of ..... in the year ....., (or, as security for the payment of a note or obligation, describing it, etc.) A B."

The California courts have been loath to enforce a mortgage or to declare it valid where there has been an omnibus or roving description, on the basis that such description is too indefinite, general and uncertain to furnish, through constructive notice thereof, the means of identification, and therefore furnishes neither guide

nor protection to either purchaser or seller concerning specific chattels.

A further distinction emphasized by the courts concerns itself with whether the controversy is between the parties or involves a third person. As between the parties, a description of the property mortgaged is sufficient if it so identifies the chattel that the mortgagee may say with reasonable certainty what is subject to his lien, but as stated in 10 Am. Jur. 752, §55:

> "To be sufficient against a third person, the description of the mortgaged property must be definite enough to enable him, aided by inquiries which the instrument itself suggests, to identify the property. A description which may be amply sufficient as between the immediate parties to a mortgage will, in many cases, not be sufficient as against creditors of, or purchasers from, the mortgagor."

Appellant, as trustee in bankruptcy, stands in the position of a third party creditor.

Section 70c of the Bankruptcy Act (11 U. S. C. §110c) provides in part:

> "The trustee, as to all property . . . upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and power of a creditor then holding a lien thereon by such proceedings."

The attempted description of personal property in the subject chattel mortgage is an inadequate description under California law, and said mortgage by virtue of such insufficient, uncertain and indefinite description is

invalid as against third parties, including the trustee in bankruptcy.

The United States District Court for the Southern District of California has twice had the occasion, in the past several years, to examine into and rule upon questions similar to that presented in the instant case. The first of said two cases was *In re Kessler,* 90 Fed. Supp. 1012 (1950). Here the Court (Mathes, D. J.) held that the chattel mortgage was invalid because of an unreasonable delay in recordation and:

> "Furthermore the description in the mortgage of the chattels intended to be covered is insufficient for identification."

In this case, the chattel mortgage executed by the bankrupt described a cash register, soda fountain, and other equipment, gave the mortgagor's occupation as "Kessler's Pharmacy" and gave the location of the mortgaged property as "Burbank, California." The District Court cited as leading California cases on the question of adequate description of property in a chattel mortgage the following:

> *Pace v. Threewit,* 31 Cal. App. 2d 509, 88 P. 2d 247 (1939) and
>
> *Pacific States Savings & Loan Co. v. Hoffman,* 134 Cal. App. 604, 25 P. 2d 1007.

In 1954 Judge Mathes again considered the problem in the case of *In re Driscoll,* 127 Fed. Supp. 81. In the latter case, the chattel mortgage of the bankrupt restaurant operator specifically listed a number of items of restaurant equipment, in many instances with the serial numbers, model numbers, manufacturers' names, dimensions, colors and materials of which constructed. The

fourth item, for example, is described as: "One multiple malt mixer with dispenser model number 9 B 3, Serial Number 33907." No location other than "County of Los Angeles" was stated in the mortgage. Judge Mathes held that where the property had been described in sufficient detail so as to enable it to be found and identified on inquiry, the failure to give the address where the property was located did not destroy the validity of the mortgage. Judge Mathes referred to his decision in the *Kessler* case *supra,* stating that the ground of invalidation in the latter case was the unreasonable delay in recordation and that his comments about the insufficiency of description were *obiter dictum.*

While the main issue in the *Driscoll* case was the significance of the absence of an address in the mortgage, the Court seriously discussed and reviewed California law generally on the question of sufficiency of description, and the opinion of Judge Mathes states:

> "The rule as stated by the California Courts governs here: 'To be sufficient against a third person, the description of the mortgaged property must be definite enough to enable him, aided by inquiries which the instrument itself suggests, to identify the property.' "

The Court cited:

Pace v. Threewit, supra, 31 Cal. App. 2d at p. 510, 88 P. 2d at p. 248;

Pacific National Agricultural Credit Corporation v. Wilbur (*supra*), 2 Cal. 2d at p. 589, 42 P. 2d at p. 320;

United Bank & Trust Co. v. Powers, supra, 89 Cal. App. 690, 265 Pac. 403;

John Breuner Co. v. King, supra, 9 Cal. App. at p. 273, 98 Pac. at p. 1078;

Cf.

Osborn v. Wells (6 Cir., 1934), 69 F. 2d 970.

Here again Judge Mathes ruled in favor of specificity as compared with generality in description.

In *Pace v. Threewit,* 31 Cal. App. 2d page 510, 88 P. 2d page 248, the Court turned once again to the general rules set forth in 10 Am. Jur. page 752, Section 55:

> "Third parties are under no obligation to exhaust every possible means of information before they can safely proceed to treat the property of the mortgagor as unencumbered. The record of a mortgage is not constructive notice to them where it does not describe any particular property or furnish any data which will direct the attention of those reading it to some source of information beyond the words of the parties to it. In nearly all cases, however resort must be had to other evidence than that furnished by the mortgage itself to enable third persons to identify mortgaged property, and generally where there is a description of the property mortgaged and the description is true and by the aid of such description and the surrounding circumstances the third person would in the ordinary course of things know the property that was mortgaged, the description will be held to be sufficient."

After stating the general rule, the Court turned its attention to the earlier case of *Pacific National Agri-*

cultural Credit Corporation v. Wilbur, 2 Cal. 2d 576, 42 P. 2d 314, and observed that the Court in the earlier case had quoted the rule from 11 C. J. 457:

> "As against third persons the description in the mortgage must point out the subject-matter so that such persons may identify the chattels covered, but it is not essential that the description be so specific that the property may be identified by it alone, if such description suggests inquiries or means of identification which, if pursued, will disclose the property covered. This rule is based upon the maxim, that is certain, which is capable of being made certain. So a description is sufficient if it may be aided by parol proof and the property covered by the mortgage identified."

Pace v. Threewit observes in connection with the above-quoted rule that:

> "*It is a well-settled rule that parol evidence may aid but not make a description.*" (Emphasis added.)

The Court goes on further in the *Pace v. Threewit* decision to place special emphasis on the rule that parol evidence may aid but not make a description, stating:

> "It is pointed out in the rules above set forth that the description should be such that the property may be identified by it alone or that the description in itself should suggest inquiries or means of identification which, if pursued, will identify the property. But, as pointed out in some of these cases, the suggestion of a line of inquiry must appear in the mortgage itself and not rest solely in the mind of the mortgage or mortgagee."

The most recent case reported in California on sufficiency of description of a chattel mortgage is *Witt v. Milton,* 305 P. 2d 944, D. C. A. First Dist. Div. 1 Calif., January 14, 1957. Here again the Court indicated that a chattel mortgage which did not adequately describe what was being mortgaged so that it could be easily identified was void as to third parties. The Court stated in its decision:

> "Plaintiff has cited and we have found no case where extrinsic evidence has been admitted to identify the chattels mortgaged unless there is something in the description or in the mortgage itself which suggests inquiries or means of identification. Apparently it is plaintiff's theory that without any specific clue to identification in the mortgage, he would be permitted to prove where, as a matter of fact, the property was located, the mortgagor lived, and the manner in which and from where defendants acquired the property. This theory violates the rules set forth in the above mentioned cases. As said in *Pace v. Threewit, supra,* 31 Cal. App. 2d 509, 512, 88 P. 2d 247, 248, quoting from Cobbey on Chattel Mortgages, Section 170, it must be ' "A description which will enable third persons to identify the property, aided by inquries which *the mortgage itself indicates and directs* * * *." ' (Emphasis added.) Again the court quoted from *Ehrke v. Tucker,* 99 Kan. 52, 160 P. 985, " '* * * the suggestions which indicate the line of inquiry must be taken from the mortgage itself and not rest alone in the mind of the mortgagor or mortgagee.' "

Thus, it appears that it is impossible from the mere listing of the articles in the mortgage to de-

termine their identity, and hence under the authorities, the mortgage is void as to third parties, and hence as to defendants."

Applying the above law to the case at hand, it is clear that it was error to admit the inventory list into evidence and to rely upon the inventory list as providing the necessary description of the mortgaged articles. Nothing in the instrument itself suggests the existence of such inventory list or an inquiry which would lead to such list. The Referee based this portion of his ruling *solely* upon the fact that the instrument contained the address of the mortgagor. The Referee, in his ruling from the bench, stated as follows:

> "An inquiry at that address would have led to the escrow, and the escrow had the detailed description of the mortgaged property in its file, and that description is identified in the supplemental escrow instructions. This exhibit 'McIntyre's No. 3' is captioned 'Inventory,' and the inventory is referred to in the supplemental instructions, so that you have the whole thing."

In other words, says the Referee (and so also the District Court below), any time the parties include an address in the mortgage instrument, it is no longer necessary to give *any* description of the property being made subject to the chattel mortgage, because any interested third person may go to that address, knock on the door and inquire as to what the parties intended to be covered by their recorded mortgage This, it is submitted, is not at all the law of California.

While appellant does not concede that a mere reference to the inventory list in the body of the instrument

would be sufficient to put third parties on notice of the contents of such list (*In re Mineral Lac Paint Co.*, 17 Fed. Supp. 1, discussed *infra*), the total absence in the instrument of any suggestion of such a list makes evident the error of admitting such list into evidence. And without such list, we have no description of any kind.

Without aid of outside information, the "description" appearing on the face of the subject mortgage fails adequately to describe the property intended to be made subject thereto. It was error to interpret the word "certain" as meaning "all."

The Referee held that "The description as given on the mortgage itself [in] itself is self-sufficient" [Tr. 59]. As to this portion of his holding, the Referee is saying that the language appearing on the face of the mortgage, unaided by outside infomation, is sufficient to inform (and charge) third persons as to the items of personal property made subject to the mortgage. To do this, the Referee had to, and did, conclude that the word "certain" as used in "Certain fixtures, machinery and tooling equipment . . ." meant, "all," and did not mean "some" or "a portion of." [Tr. 59, 60]. As a matter of fact, the Referee first translates this particular "certain" to mean "the," and then by implication reads the newly provided description "*the* fixtures, machinery and tooling equipment . . ." as meaning *all* fixtures, machinery and tooling equipment of the bankrupt corporation. With the sincerest of respect for the Referee, it is submited that such license with words is more appropriate for poetry than logic in the law.

The Referee conceded [Tr. 60] that if the word "some" or the word "part" had been used in the place of "certain" his ruling would have to be different.

Appellant submits that there is substantial authority that the word "certain" is not the equivalent of "all," but is rather the equivalent of "some among possible others."

As stated in Black's Law Dictionary (4th Ed.) 1951, under the heading "CERTAIN," this word includes among other definitions the following:

> "Some among possible others, *in re Mineral Lac Paint Co.*, D. C. Pa. 17 Fed. Supp. 1, 2."

The *Mineral Lac Paint Co.* case presented precisely the question with which this appeal is concerned. It involved the objection by a trustee in bankruptcy to the validity of a conditional sale contract (presented as the basis of a reclamation petition) upon the basis that such contract failed adequately to describe the machinery and equipment sold. The subject conditional sale contract referred to "certain machinery, apparatus, plant and equipment now upon premises 3306-16 E. Thompson Street, Philadelphia, Pennsylvania, described in a schedule hereby annexed, made a part hereof and referred to as Exhibit 'A'." However, no schedule of machinery and equipment was actually annexed to or filed with the conditional sale contract.

The District Court held that the document was incomplete without a more definite and specific description of the machinery and equipment and denied the reclamation petition. The Court stated (at page 2):

> "We think that the word 'certain,' used in referring to the machinery and equipment in the part of the contract which we have quoted, followed as it is stated to be by a detailed description (which was not in fact attached), was used in the sense of 'some

> among possible others.' Webster's New International Dictionary of the English Language (2d Ed.) Unabridged, p. 440, definition 2b. As so interpreted the language referring to the machinery and equipment in the contract is too indefinite to constitute a sufficient reference to support the agreement."

The law of the *Mineral Lac* case was reaffirmed and followed in the matter of *In re Smith,* also District Court Pennsylvania, 19 Fed. Supp. 597. This case also involved a sufficiency of description as machinery and equipment that was the subject matter of conditional sale agreements (subject, in Pennsylvania, to the requirements of the Uniform Conditional Sales Act). In the *Smith* case, the Court conceded that parol evidence is admissible to identify property which is the subject of such a contract, but held the contracts invalid, stating:

> "It is we think equally clear that the contract must itself definitely indicate identifiable goods as having been sold and must itself suggest the inquiries by means of which if pursued the goods may be further identified."

All parties have recognized that the subject instrument must itself, within its four corners, suggest the inquiries by means which, if pursued, the personal property may be further identified. The fact that the *Mineral Lac* contract referred to a schedule of machinery and equipment which in fact was not attached, makes the *Mineral Lac* case even stronger in support of appellant's position. The reference to a schedule or an exhibit (not attached) might be considered as suggesting an inquiry. The total absence of any reference to any schedule or exhibit hardly suggests inquiry.

Additionally, it is submitted that it is the reasonable inference from the evidence that it was never the intention of the draftsman of the subject instrument that the mere words "certain fixtures, machinery and tooling equipment" be considered as either the intended or proper description of the items to be covered by the mortgage, but rather that the escrow officer or whoever typed the words onto the mortgage form fully expected to attach to said mortgage the detailed list of machinery and equipment of the mortgagor, which list, if so attached, would have supplied the necessary description.

Conclusion.

Relating the rules enunciated above, governing the degree of definiteness of description of mortgaged chattel, it is most evident that the chattel mortgage of appellees clearly fails to specify the very minimum requirements of description of mortgaged chattels. "Certain fixtures, machinery and tooling equipment" of the bankrupt were purportedly mortgaged by the subject instrument. Such description, by itself, is not sufficient or adequate. No further description or list is provided an interested creditor. Nothing in this description suggests a line of inquiry which if pursued would enable an interested third person to determine what personal property of the mortgagor was involved. Nothing in the body of the subject mortgage assist an intelligent inquirer in finding out what the mortgagor and the mortgagee had in mind. Any assistance which could have been provided was frustrated by the affirmative directions given by both parties to the escrow holder not to attach the list of inventory to the chattel mortgage at the time of recordation. This direction was in direct contravention to the

purpose of the statute and resulted in a completely inadequate legal description being recorded.

Upon all of the grounds herein presented, the order of the Referee and the Order of the District Court Affirming the Order of the Referee should be reversed, with instructions to the Court below to enter judgment for appellant trustee in bankruptcy, declaring the subject chattel mortgage to be invalid and that appellees have no lien upon any of the assets of the subject bankrupt estate.

Respectfully submitted,

ROBERT H. SHUTAN,

MILTON FEINERMAN,

Attorneys for Appellant.